IN THE SUPREME COURT OF THE UNITED STATES

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BURLINGTON NORTHERN AND :

SANTA FE RAILWAY COMPANY, :

Petitioner :

v. : No. 05-259

SHEILA WHITE. :

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Washington, D.C.

Monday, April 17, 2006

The above-entitled matter came on for oral argument before the Supreme Court of the United States at 11:04 a.m.

APPEARANCES:

CARTER G. PHILLIPS, ESQ., Washington, D.C.; on behalf of the Petitioner.

GREGORY G. GARRE, ESQ., Deputy Solicitor General, Department of Justice, Washington, D.C.; on behalf of the United States, as amicus curiae.

DONALD A. DONATI, ESQ., Memphis, Tennessee; on behalf of the Respondent.

C O N T E N T S

P R O C E E D I N G S

(11:04 a.m.)

CHIEF JUSTICE ROBERTS: We'll hear argument next in Burlington Northern and Santa Fe Railway Company v. White.

Mr. Phillips.

ORAL ARGUMENT OF CARTER G. PHILLIPS

ON BEHALF OF THE PETITIONER

MR. PHILLIPS: Thank you, Mr. Chief Justice, and may it please the Court:

There is no more vexing set of issues in the employment discrimination context than arise out of issues of retaliation under section 704 of title VII. As the Solicitor General's brief and a couple of the other amici briefs point out, the number of -- the number of these claims has increased by more than 100 percent over the course of the last decade, more than 30 percent of the EEOC's docket is now made up of retaliation claims, and the cost of an average contested retaliation claim exceeds $130,000 per case. Plainly, this is a fundamentally important question, and the standard to be applied under section 704 is critically important to both employers and employees.

And the respondent has given you truly a choice and not a shadow in this particular case because

the respondent's analysis of section 704, based essentially on the language, any discrimination, is that everything that is in any sense against an employee, any act of retaliation, no matter how trivial, is nevertheless a basis for a section 704 lawsuit.

This is a position that's embraced by none of her supporting amici. It's a position that's been embraced by no court of appeals up until this point, and it is a position that is utterly untethered in the relationship between section 704 and its language and section 703, which is the heart and soul of the anti-discrimination norms in title VII.

CHIEF JUSTICE ROBERTS: It has been endorsed by the EEOC, though.

MR. PHILLIPS: Not -- not that broad -- no, not even the EEOC in its most aggressive interpretation, which obviously the United States has rejected in this case, ever went to the point of saying any. And I'll give you a good illustration of that because in the guidelines, the commission always said that in a situation where there was absolutely no question of retaliation, charge filed against a supervisor, supervisor disinvites an employee to lunch, a lunch that's held with all the other employees -- it

has always been the position of the -- of the EEOC that in that circumstance, that would not be enough to raise even a fact issue to go to a jury on.

Under the respondent's theory of this case, it is clear to me that being disinvited to a lunch would, in fact, be a basis for a Federal lawsuit under section 704.

So there is no one, neither governmental nor nongovernmental, that has embraced the extreme position that the respondent has put forward under section 704.

And indeed, it's very difficult for me to understand why Congress would ever have adopted a rule that was more protective of those against whom -- against -- where retaliation takes place as opposed to the core of who was protected by section 703, which is the people who are in the protected class in the first instance.

To adopt the rule, I think, of the respondent in this case would not only increase the number of claims another 100 percent, at least, in the future, but it seems to me would render completely meaningless the observation of this Court in Weber that management prerogatives are to be left undisturbed to the greatest extent possible. There are no management prerogatives once an employee has filed a complaint under -- and,

therefore, is protected under section 704. At that point, everything becomes essentially a straitjacket problem.

I don't think there's a rationale to support that interpretation, and so therefore the question is, what is the right standard under section 704?

And here, it seems to me the United States and Burlington Northern are on exactly the same page. We believe that this Court announced the appropriate standard under section 703 in dealing with harassment cases. That's the Ellerth standard, and we believe that the Ellerth standard is the proper one for defining a tangible employment action.

JUSTICE SCALIA: But 703 has the language and 704 doesn't. I mean, 703 has language limiting it to -- to employment, prerogatives of employment. 704 doesn't.

MR. PHILLIPS: Right. Justice Scalia, this Court has also said that that negative pregnant has never been used as an overarching interpretive guide. You have to evaluate 703 and 704 in tandem, and it seems much easier to interpret 704 as simply using discrimination against as a shorthand for the wide range of discriminations that are outlined in 703. It seems quite cumbersome, at a minimum, and probably

worse if Congress were to actually sit down and try to rewrite every aspect of 703 in order simply to say in addition to the protected classes that 703 protects, there is certain conduct under 704 that we protect in exactly the same way that we protect --

JUSTICE SCALIA: No. It wouldn't have to do -- I mean, fairly -- you know, to be fair, it wouldn't have had to say that. It would have said any -- any act that is discrimination under 703. Any act that is discrimination under 703. Seven words it could have said.

MR. PHILLIPS: They could have said it that way, but it seems to me quite clear that Congress still intended for 703 and 704 to be interpreted in pari materia. And -- and again, you -- you still run into the same problem, Justice Scalia, as to why is it that Congress would want to protect more thoroughly 704 plaintiffs than it would 703 plaintiffs. And it seems to me there's no --

JUSTICE SCALIA: That's a curiosity. It is.

JUSTICE BREYER: Well, the answer would be because Congress is worried that people won't complain. That's why. And there are millions of ways of harassing people. They start issuing a complaint. You do all kinds of things. You freeze them out. You --

you insult them. You -- I mean, it's easy to think of things that don't rise to the level of the -- Ellerth.

So, I mean, if I -- maybe I'm right, maybe I'm wrong, but if I'm right, why not just take, say, the D.C. Circuit standard? They -- they say that you have to show that the employer's action would have been material, which means the action might well have dissuaded a reasonable worker from making or supporting a charge of discrimination. Now, how about that? That has the virtue of allowing a person not to be harassed, et cetera, who wants to make a complaint, and it also allows the judge to focus on the particular case and see if what the person is doing is reasonable. It holds the complainant to a standard of reasonableness, which is common in law.

JUSTICE SCALIA: And the issue would be, I assume, how much a reasonable person likes a free lunch.

MR. PHILLIPS: That would be -- that would be the question.

JUSTICE BREYER: Well, in fact, if it turns out to be the power lunch of all time and, in fact, the person can't be at the power lunch because she's a woman, for example, and therefore, her future career is likely to take a real nose dive, why shouldn't that

count as a violation?

MR. PHILLIPS: Well, I will tell you, Justice Breyer, that the -- at least one of the problems with that is that the EEOC's guidelines expressly state that that is not a claim that's actionable under section 704.

JUSTICE GINSBURG: They say one lunch, but not if there's a weekly lunch, and the only person who gets left out is the person who filed a charge under title VII. That's -- a one-at-a-time curiosity the EEOC guidelines leave out, but if it's a routine lunch with all the preferred employees and they leave out the one who filed the title VII charge, that would fit within the EEOC's definition.

MR. PHILLIPS: That would fit under the EEOC's definition, although I don't think it's an answer to Justice Breyer's hypothetical --

JUSTICE GINSBURG: But it wouldn't fit under your --

MR. PHILLIPS: -- that was talking the big power lunch.

JUSTICE GINSBURG: Under your definition, lunch is lunch, and so there would never be -- there couldn't be --

MR. PHILLIPS: No, not under my -- no, that's

not necessarily the case, Justice Ginsburg. In my -- you know, there are two standards under -- under an adverse employment action. The first one is whether there's a tangible action, and that's the Ellerth standard. And then there's always the pervasive and severe standard, so that if you have -- you know, being routinely excluded rises to the level of pervasive or severe, that would still be actionable under 704 in exactly the same way that that's actionable under 703.

JUSTICE GINSBURG: Well, does it or doesn't it? The -- the facts are simply that the manager takes out all the employees, except this one that filed the title VII charge, once a week. Is that --

MR. PHILLIPS: And -- and does it on a pervasive basis, sustained and pervasive basis.

JUSTICE GINSBURG: Does it once a week, and I'm not using any adjective to characterize it. It just happens once a week.

MR. PHILLIPS: Well, I think you probably have a jury question at some point, depending on how long it went on for because it would become -- it would become a pervasive practice. And under those circumstances, this Court has a rule that allows that to become a jury issue. But if it's only once or twice, it strikes me that that's not a particular

problem.

JUSTICE KENNEDY: Well, how excluding from the forklift forever or a year? You can't work the forklift for a year.

MR. PHILLIPS: Well, the -- the reason why that's not a problem is that there is no economic effect that attaches to not working on the forklift for a year or for 10 years. The -- the proof in this case is absolutely clear.

JUSTICE KENNEDY: Well, it has an effect on your back.

MR. PHILLIPS: But that was not the -- but the -- but she didn't get hired as a forklift operator. She was hired as a track laborer, Justice Kennedy.

JUSTICE KENNEDY: Yes, but you've got a jury --

JUSTICE SOUTER: Okay, but if that argument is sound --

JUSTICE KENNEDY: -- you've got a jury finding here. You've got a jury finding this was discriminatory.

MR. PHILLIPS: Well, there's -- there's no question that there's a jury finding of retaliation. The question is whether or not this is a tangible employment action.

JUSTICE SOUTER: Yes, but if your -- if your argument is sound, Mr. Phillips, then -- then any employer is well advised to define job categories by having one really nice job within the category and one really rotten job within the category. And if anybody who's got the nice job does something like make a title VII complaint, automatically gets, in effect, reassigned to the rotten job, and your answer will be, you know, there's no economic effect. They're getting the same amount of money each week. I mean, that would seem to me -- asks for an end run around the whole concept of retaliation.

MR. PHILLIPS: Justice Souter, let me -- in the first place, it's not a very practical hypothetical because, one, when you -- when you define your job positions --

JUSTICE SOUTER: Well, isn't -- isn't there a big difference between sitting on a seat and running a forklift and -- and picking up steel rails with your bare hands?

MR. PHILLIPS: Well, one, she wasn't typically picking up steel rails with her bare hands. All of this stuff is done mechanically. She was pulling nails out of rails periodically. So I'm not sure that that's precisely the way to characterize it.

But the -- but at the end of the day, it still seems to me that what Ellerth tells you you should look at is primarily whether there is a -- a direct economic effect. And if there is no direct economic effect, then what you ought to be looking for is whether or not the -- the conduct is severe or pervasive, and -- and if it is --

JUSTICE SOUTER: Okay, but --

MR. PHILLIPS: -- then, it seems to me, there's a separate action. But that's not the claim she brought in this case.

JUSTICE SOUTER: Okay, but do you -- do you agree that direct economic effect cannot be the only criterion here?

MR. PHILLIPS: No, I don't think it can be the only criterion. I think that you would have a situation -- and a lot of times the -- the economic effect will be either immediate or potentially indirect in the sense of the hypothetical the commission uses in its guidelines where a butcher is shifted over to be a cashier. And in that situation, that's a fundamentally different job with a fundamentally different career path. And it may not have any economic effects in the short run, but in the long run, it will have. And that may be an answer in part to your question, Justice

Souter, about just one big job classification that --

JUSTICE STEVENS: May I ask you this hypothetical? Supposing people like to work the forklift, but nobody had a -- a right to do it, but they traded every day or something like that, and the company put out a notice that said anybody who -- who files a claim will not be eligible to ride on the forklift ever again.

MR. PHILLIPS: Right. That's a quid pro quo violation.

JUSTICE STEVENS: That would be a violation?

MR. PHILLIPS: This Court held in -- in Ellerth that those kinds of quid pro quos are -- are subject to liability.

JUSTICE STEVENS: So anytime there's an advance notice that you will -- there will be some kind of action in response to a -- a claim, that would be retaliation.

MR. PHILLIPS: Right, because the employer -- I mean, employers aren't going to --

JUSTICE STEVENS: Even though it was not an adverse job action.

MR. PHILLIPS: -- adopt that kind of a standard.

I'm sorry, Justice Stevens?

JUSTICE STEVENS: Even though it did not amount to -- did not have any economic effect on the employee.

MR. PHILLIPS: Well, in that -- you know, in -- under those circumstances, it seems to me that the standard is slightly different for quid pro quo violations than they are for simply tangible employment actions.

JUSTICE STEVENS: So a quid pro quo violation does not have to be an adverse employment action.

MR. PHILLIPS: It -- right, because the -- there are -- I mean, they are all adverse employment actions. There's a tangible employment action. There's a quid pro quo action, and then there's the --

JUSTICE STEVENS: It seems to me that -- that interpretation requires you to interpret 703 and 704 differently.

MR. PHILLIPS: No. I -- I don't believe so because I'm -- I'm -- what I'm trying to do at least is to apply the Ellerth standard under 703 for each of the three elements in the same way that I'm trying to apply them under 704.

JUSTICE SCALIA: But -- but are you? I'm -- I'm a little concerned that -- that you're trying to persuade us to interpret 704 the same as 703 at the

expense of watering down 703. I don't understand how you can concede that -- that refusing to invite somebody to lunch, if it's more than -- more than a single lunch, could be a violation of 703. How does that come within the -- with respect to compensation, terms, conditions, or privileges of employment?

MR. PHILLIPS: Well, I think that if -- if you could certainly envision a circumstance -- and again, this goes to the pervasiveness of it. It's -- it's a fundamental, sort of constructive adjustment of your employment situation. Terms and conditions is a fairly capacious term, Justice Scalia, and I could well imagine that if you were being systematically treated differently and differently from every other employee --

JUSTICE SCALIA: Not -- not by the --

MR. PHILLIPS: -- then at some point it becomes severe or pervasive in a way that -- that, it would seem to me, would raise a jury trial issue.

JUSTICE SCALIA: And -- and going to lunch is the conditions of employment.

MR. PHILLIPS: Going to lunch once, no.

JUSTICE SCALIA: Privilege.

MR. PHILLIPS: Going to lunch twice, I'm sure not. But, you know, if it is a continuous process, at

some point it strikes me that it would become somewhat problematic. Yes.

JUSTICE GINSBURG: But let's get the --

MR. PHILLIPS: But -- and that is why it's important, and it goes back to Justice Breyer's question, if I can go back to that for a second, because he asked about the D.C. Circuit's opinion, which, you know, of course, adopted the EEOC's now-discredited theory of this case and, again, untethers 703 from 704. That's the problem with the D.C. Circuit's interpretation.

JUSTICE BREYER: Why? Why? You see, I can think of a million things. I can't think literally of a million, but it does seem --

MR. PHILLIPS: I suspect you could.

(Laughter.)

JUSTICE BREYER: -- to me there are many, many possible ways of really discouraging a worker from complaining that are not quite as tangible as the list under 703. So the D.C. Circuit -- and I think even the SG here, which seems like a variation of the D.C. Circuit -- much -- the standards seem much -- not as different as you might -- as it seems to me you're saying. But -- but they're -- they're trying to be a little vaguer and a bit broader than the specific

Ellerth language because they recognize there are many possible ways of seriously injuring a person with the intent or -- to stop them from complaining. That gives effect to the language differences.

MR. PHILLIPS: Right.

JUSTICE BREYER: It leaves it up to case-by-case. It leaves it up to the administrative agency, all in areas where I frankly don't know one lunch from another.

MR. PHILLIPS: I'm sorry?

JUSTICE BREYER: I don't know one lunch from another often, but the -- the EEOC might and -- and so might a judge who hears evidence.

MR. PHILLIPS: Justice Breyer --

JUSTICE BREYER: And that's the virtue of their standard.

MR. PHILLIPS: -- I mean, you can ask Mr. Garre what his view is with respect to the waiting on the position of the Solicitor General here.

But it still seems to me that there is a fundamental difference between the way the D.C. Circuit is analyzing this case and -- and the way this Court analyzed it Ellerth. And the fundamental difference is -- I agree with you. There are other circumstances that are not tangible employment actions that are,

nevertheless, actionable under both 703 and 704, but those are -- those are taken care of under the Meritor standards. The -- the assumption is that they are both retaliatory in purpose and that they are severe or pervasive.

JUSTICE GINSBURG: What about the --

MR. PHILLIPS: When you reach that standard, then you create a question of fact for the jury.

JUSTICE GINSBURG: -- what about the Seventh Circuit case that posed the question of same job, same character of work, except that the employee had flex time, which enabled her to take care of her disabled child when she could leave at 3:00, and she's just changed to -- same job except it's got to be 9:00 to 5:00. Would that fit within your definition?

MR. PHILLIPS: I doubt it actually, Justice Ginsburg, because I think typically mere inconveniences, even -- even significant inconveniences, have traditionally been rejected as bases for taking an issue to the jury.

JUSTICE GINSBURG: Even though the jury has made a finding that the only reason that was done was in retaliation for her having filed a complaint.

MR. PHILLIPS: Justice Ginsburg, every one of these cases is based on the assumption that the only

reason it was done is because of retaliation.

JUSTICE GINSBURG: Right.

MR. PHILLIPS: The lunch is in exactly the same position.

JUSTICE GINSBURG: But you would say that's outside --

MR. PHILLIPS: So that can't be the standard.

JUSTICE GINSBURG: -- that would be outside 704 if this is done deliberately in retaliation for filing a complaint. Just switch her from a work routine that she could easily manage and still take care of her family and to one that is impossible for her to manage.

MR. PHILLIPS: Justice Ginsburg, if you adopt the other approach, what you say is that every change in assignments within the ordinary course of business is subject to claim by a plaintiff --

JUSTICE GINSBURG: Not -- not --

MR. PHILLIPS: -- in any situation --

JUSTICE GINSBURG: -- not every --

MR. PHILLIPS: -- where he or she thinks she's been retaliated against.

JUSTICE GINSBURG: Not everyone, but only the ones that would, in fact, deter a reasonable person from filing the charge. And that would not be every

trivial --

MR. PHILLIPS: And -- and again, the problem with that legal standard, Justice Ginsburg, is it is not the same one that applies under section 703, and it seems to me there's no reason to provide greater protections under 704 to plaintiffs than you would have under section 703.

JUSTICE SCALIA: Why wouldn't you say that Justice Ginsburg's hypothetical would be covered by the Meritor standard, if in fact this woman couldn't -- couldn't really do the job with this -- with this new time assignment? Why wouldn't it qualify as being sufficiently severe or persuasive --

MR. PHILLIPS: Pervasive.

JUSTICE SCALIA: -- to alter the conditions of the victim's employment and create an abusive work environment?

MR. PHILLIPS: I mean, to be sure, that's a possibility -- that's a possible answer.

JUSTICE GINSBURG: But that -- this is a peculiar effect on one person, but for most people --

MR. PHILLIPS: But it could be severe enough.

JUSTICE GINSBURG: -- most people it wouldn't matter. But --

MR. PHILLIPS: Right, but the question is, is

it severe, I think, to that person? I think that is the Meritor standard, is, is it severe to the individual plaintiff?

JUSTICE GINSBURG: So you're changing your answer. You originally told me that, no, that that wouldn't fit because it's the same job.

MR. PHILLIPS: Right. Well, that's because that's the tangible employment aspect of it. Justice Scalia says you're right about -- well, I don't know if he said I'm right about the tangible -- tangible employment aspect of it. But he says, you know, as you recognize, there is a second category of claims, and the second category of claims is the Meritor standard, which I've been arguing for.

JUSTICE ALITO: Isn't a change in the hours that a person works a change in the terms and conditions? If change somebody's shift from the day shift to the -- to the night shift, isn't that a change under 703?

MR. PHILLIPS: It -- it probably depends on whether or not it was the expectation of the -- of the employee that -- that he or she would have a certain set of hours, because an awful lot of employees take a job with the expectation that they'll work any hours. Now, you may get into a particular pattern and -- and

even set yourself up for that, but if -- if the expectation is that you were going to work potentially 24 hours and you shift from one set to another, that I don't think is a change in terms and conditions of employment within the meaning of 703.

If I could just shift slightly to the suspension, pending investigation, part of the case. And there are two parts, and it's important to recognize that if the Court sets aside either one of those claims, then we're entitled to a new trial because the damages flow directly from both and there was no specific -- there was no special verdict in this case to identify what -- where the damages come from.

And our argument with respect to the suspension, pending investigation, is that there was simply no final action taken by the employer in this context until 15 days later. She was suspended for insubordination by her supervisor. Under the collective bargaining agreement, all she had to do was send in a letter. If she didn't want to send in a letter, the -- the decision would become final and there would be final action that's clearly subject to a claim under section 704.

She did send in a letter. There was an informal investigation. The informal investigation

concluded that there was no basis for suspending her for insubordination, and she was reinstated with complete back pay.

JUSTICE SCALIA: So she was docked in her pay for 2 weeks. I mean, for some people, this would be a real hardship, no pay for 2 weeks. I mean, it's -- it's final as far as she's concerned, for those 2 weeks.

MR. PHILLIPS: Except that it was all -- it was -- it was reinstated.

JUSTICE SCALIA: Yes, well, they went back later and -- and made up for their mistake. But -- but the -- it seems to me the issue is whether a mistake was made that -- that was final action that hurt her. I don't see why -- it's certainly official action. I mean, you can't say --

MR. PHILLIPS: There is official action.

JUSTICE SCALIA: -- it's not official just -- just because it was decreed by a -- you know, a track boss or something. It -- it was an action of the company because the company cut -- cut off her pay for 2 weeks. Right?

MR. PHILLIPS: Right, but then the question still remains, Justice Scalia, for it to be a tangible employment action, is it -- is it available to the

employer to cure, when the purpose of this entire statutory scheme is to avoid litigation and to provide informal mechanisms for protecting the rights of the employee.

JUSTICE GINSBURG: But it didn't --

JUSTICE SOUTER: Yes, but if the employer --

JUSTICE GINSBURG: -- it didn't cure. I mean, it was 37 days, right, that she went without pay?

MR. PHILLIPS: Right.

JUSTICE GINSBURG: Not just 2 weeks. And she understandably experienced much stress in that time. She worried about how she would be able to feed her children, could she get them Christmas presents. That was -- there was nothing that she got, when it was determined that she hadn't been insubordinate, that compensated her for that stress and, indeed, for the medical expense that she incurred because she had that stress.

MR. PHILLIPS: Justice Ginsburg, there still remains the core question of whether this is a tangible employment action. It's not a long-term action. It's not an economic effect, and the fact of -- of anxiety -- that happens all the time in the work place. It's not actionable.

JUSTICE GINSBURG: But when -- when somebody

is suspended, it seems to me that is as tangible as it can get. It gets registered officially. This person is suspended, and if she doesn't do something about it, she's out.

MR. PHILLIPS: But she did something about it, and it was corrected, Your Honor.

I'd like to --

JUSTICE GINSBURG: But --

JUSTICE SOUTER: Yes, but --

JUSTICE GINSBURG: -- official action is -- is different from -- the problem with Ellerth was that if there's nothing formally that had been done, the employer -- this -- Ellerth was concerned with vicarious liability, nothing official. There had been none -- the boss wouldn't know about it. But somebody who is suspended, that is an official -- that's a tangible action.

MR. PHILLIPS: To be sure. And the question is, can you cure it? And that's the fundamental issue we ask you to decide.

Can I reserve the balance of my time?

CHIEF JUSTICE ROBERTS: Thank you, Mr. Phillips.

Mr. Garre.

ORAL ARGUMENT OF GREGORY G. GARRE

ON BEHALF OF THE UNITED STATES, AS AMICUS CURIAE

MR. GARRE: Thank you, Mr. Chief Justice, and may it please the Court:

Because title VII prohibits an employer from suspending an employee for 37 days without pay because of her sex or from reassigning her from one responsibility that's material different -- materially different than another responsibility because of her sex, it prohibits an employer from doing so because she filed an EEOC charge complaining about discrimination.

Title VII's anti-retaliation provision creates an additional basis for unlawful discrimination, but it does not create a different or more expansive concept of discrimination in the statute's core prohibitions.

CHIEF JUSTICE ROBERTS: Counsel, in -- in the absence of any suggestion that the collective bargaining process is also infected with sex discrimination, why can't we rely on that process to give some basis to the job descriptions? In other words, forklift operator was not a separate job from rail yard employee, and if the union wanted to make them separate jobs, they could negotiate that, but they didn't. So why -- why do we regard that as a material change when you're doing one part of a job as opposed

to another part of a job?

MR. GARRE: Well, I think the problem that Justice Souter identified, I believe, where an employer or even a collective bargaining agreement could identify categories that had so many different responsibilities --

CHIEF JUSTICE ROBERTS: Well, but the difference there is that's an employer unilaterally. We don't have that here. The employer is dealing with the union. If the jobs really were that different, the union would categorize them differently and negotiate for that.

MR. GARRE: Here, what we know and what the jury found -- and this is actually -- it's important to keep in mind. This is a jury finding. The jury was instructed properly on what would constitute a material adverse employment action. The instruction is at page 63 and 64 of the joint appendix.

One of the conditions that a jury could find an adverse action based on was a materially significant change in responsibilities. The jury heard evidence on the different types of responsibilities that the respondent performed, and it concluded that being changed, being reassigned after 3 months of working the forklift, to manually repairing railroad track was a

materially significant change in responsibilities. That's the language that comes from this --

CHIEF JUSTICE ROBERTS: Doesn't your approach require an employer to keep shuffling the employees around so they don't get a sort of adverse possession of particular types of job responsibilities?

MR. GARRE: I don't think so. I think it would be ultimately a jury question in this particular category of claims. As -- if -- if it were the case that employees typically worked the forklift and then the next day worked the -- worked the track, then the next day did something else, then I don't think a jury could find that there was a material -- materially significant change in responsibilities.

JUSTICE SCALIA: No. That's his point. I mean, that's his point, that -- that the one way to avoid the problem is to keep shifting people around.

MR. GARRE: Well, that -- that --

JUSTICE GINSBURG: That would have been impossible here because there was no one in that entire unit who could operate a forklift except this one employee.

MR. GARRE: That's right. And -- and if -- if employees were shifted around for one reason or the other, then I still think it would be unlikely to be a

material change in their responsibilities when they went --

JUSTICE GINSBURG: Is it -- is it -- was it in this category, this track category? Because it was something new for the employer. There hadn't been a forklift operator. I gather there had only been one before.

MR. GARRE: There was testimony to that effect, Justice Ginsburg. Also, when -- when respondent was hired, they had just lost their existing forklift operator, someone who had done that.

In any event, I don't think the evidence will permit a court, if it agrees that material adverse employment action is the test, to overturn the jury's finding that the change here was materially adverse.

CHIEF JUSTICE ROBERTS: With respect to the suspension, what -- what if she had been -- during the process of investigation, she had been allowed to stay on the job with pay? In other words, the facts are the same. It's just that the -- the sort of stay process works the other way and she's not relieved until the end of the company's investigation. Is the initiation of that an materially adverse employment action?

MR. GARRE: Well, I think most courts have held that where you have suspension with pay, then you

don't have material adverse employment action. Now, at some level, if the suspension is so long, 6 months, a year, then effectively you could have a different type of material adverse action, but where it's a 2-week suspension to investigate, that would not be material adverse action. In fact, as -- as the AFL-CIO amicus brief points out, I think, that's the favored practice in the industry.

Now, we -- we do think that with respect to the standard, that as this Court recognized in Faragher, it makes good sense to harmonize discrimination standards. And here, we think that Congress intended the courts to harmonize the standard for section 704, the anti-retaliation provision, with the standard for section 03, the act's core prohibitions.

Justice Scalia, it does -- the section 704 does omit the phrase, terms, conditions of employment, but as we've explained in our brief, we think it is reasonable to read the discriminate against as a shorthand for the unlawful employment practices identified in section 703.

It's also important to keep in mind that Congress knows how to write a broader anti-retaliation statute when it wants to. Look at the ADA, the Family

Medical Leave Act. These are statutes which, by their terms, prohibit employers from any attempt to intimidate, coerce, threaten, or interfere with the exercise of rights. Look at the Family Medical Leave Act --

JUSTICE SCALIA: I don't know if that hurts you or helps you. I mean, that -- that eliminates what seems to me is the strongest argument of the -- of your side, which is that it makes no sense to impose greater sanctions upon somebody who -- who files a complaint than it does upon somebody who -- who violates somebody's race, religion, or whatever by -- by discriminating.

MR. GARRE: Well, we --

JUSTICE SCALIA: You're telling me it does make sense, that we've done it in other areas.

MR. GARRE: With respect, what I'm telling you is that Congress has determined in some areas it may be important to have a broader provision protecting against intimidation and coercion. I mean, if the Court interprets discriminate against to include all that kind of conduct, then it renders those provisions redundant.

JUSTICE GINSBURG: Does your test cover the person who's a former employee who complained under

title VII, wants a recommendation letter, and isn't given one for retaliation -- as retaliation for having complained under title VII?

MR. GARRE: It does, Justice Ginsburg. As the Government explained in its brief in the Robinson case, post-employment references are reasonably viewed as a term, condition, or privilege of employment because it's routine for employees to request them and routine for employers to provide them.

Now, if I could address the --

JUSTICE BREYER: Well --

MR. GARRE: -- the reasonably likely to deter test that you referred to, Justice Breyer.

If the Court disagrees with our submission that the statute should be written in pari materia, then as we said in our brief, we think that that is the next best test to adopt. But -- but the Court should -- it should be clear to the Court how much broader that test is than the material adverse action test.

JUSTICE BREYER: It's not -- it's not -- the -- the words of the statute that I think are relevant is it -- is it -- you can't discriminate with respect to his compensation, terms, conditions, or privileges of employment. Now, the words I just cited are present in 703. So that's the substantive offense. Those

words, as Justice Scalia pointed out and others, are missing in 704, and that suggests that you could have a broader definition than those words I just cited as to what counts as harm flowing from a discrimination. That's the statutory argument.

And then you add, there could be good reason for that. These people typically are at work and there are lots of subtle forms of harm and some not so subtle.

MR. GARRE: Well, again, we think Congress knows how to write that statute, and it does it differently. It has a different provision. For example, in the Family Medical Leave Act, not only included the coercion and intimidation language, it also said in any manner discriminate.

We also think, again, going to our interpretation of discriminate against, it makes sense to read that for a -- as a shorthand for the -- the unlawful practices spelled out and detailed in section 703.

JUSTICE BREYER: Well, I'd be curious. In the -- in the Seventh Circuit, they have a test, I gather, like the D.C. Circuit, which you've characterized as broader. Have there suddenly be a flow of these claims towards the Seventh Circuit? Is there

any empirical data that this concern that has been brought up is empirically present in the Seventh Circuit?

MR. GARRE: Two -- two points with respect to that.

First, no, I don't know of empirical data in the Seventh Circuit.

Second, we know that retaliation charges are -- are rising. They've more than doubled in the past decade.

And third, the Seventh Circuit test is essentially like the -- the test that this Court applies in the First Amendment context to determine when there's retaliation. This Court in the Rutan case observed that something as trivial as failing to hold a birthday party for an employee could satisfy that test. Applying this test in the lower courts, courts have held that an officer not being able to see his police dog would be -- could go to a jury, that -- that a shunning conduct less than hostile work environment could go to a jury, that failing to hold employee feedback meetings could go to a jury --

JUSTICE ALITO: But if 704 doesn't incorporate 703 why would the -- the EEOC test be the next best test? If Congress -- there's nothing in 704

that refers to the EEOC standard, is there?

MR. GARRE: That's -- that's true. I mean, at that point, we think it would just be a policy decision. Again, we think that Congress made the policy decision that the tests should be harmonized.

JUSTICE ALITO: Well, Congress could have -- could have said -- could have thought not only do we not want people who -- who file complaints not to suffer those things that would deter a reasonable person from filing a complaint, but we just don't want them to suffer at all for having engaged in this protected activity.

MR. GARRE: That's possible. That would be --

JUSTICE ALITO: What -- what basis would there be for deciding that Congress had one policy objective as opposed to the other there?

MR. GARRE: We think that the balance that Congress struck in title VII was from -- between deterring all forms of discrimination and not -- not allowing every employee grievance to become a Federal court case. I think the Court has recognized repeatedly not all work place conduct that's offensive or even harassing violates title VII, and we think that that same compromise should inform the Court's

interpretation of section 704 of the statute.

If there are no further questions.

CHIEF JUSTICE ROBERTS: Thank you, Mr. Garre.

Mr. Donati.

ORAL ARGUMENT OF DONALD A. DONATI

ON BEHALF OF THE RESPONDENT

MR. DONATI: Mr. Chief Justice, may it please the Court:

When Burlington Northern reassigned Ms. White from the forklift to the track and then removed her without pay for 37 days during Christmas, it, quote, discriminated against Ms. White under any reasonable standard, the EEOC standard, the plain language standard, or the standard that the unanimous en banc court of the Sixth Circuit adopted. Whatever standard the Court applies, Ms. White should prevail, if it's a reasonable standard, other than that of the -- of the petitioner.

CHIEF JUSTICE ROBERTS: What if she'd been operating the forklift for only a week and then she was reassigned? Would that still be discrimination under any standard?

MR. DONATI: With respect to the motivation, if there -- if there was a motivation, a retaliatory motivation, according to the proper reading of 704, it

would be because what that aims at is motivation.

And the question was asked, and -- and a legitimate question was asked. Why would Congress make 704(a) more expansive than 703? Well, if you look at the text of 704(a) at the beginning of the caption, it says, discriminate in assisting, participating, or cooperating with enforcement.

This -- this provision, as the dissent said in the Jackson case last term, in referring to retaliation, the dissent made this -- made this point about the relationship between retaliation and the primary right. The dissent indicated that the primary right is being protected by the retaliation provision, that without the retaliation provision, the primary right could be impeded, inhibited, and prevented from individuals having access to the remedial mechanisms.

It doesn't take much to intimidate an individual from filing a claim of discrimination if they have an economic interest. It takes much, much less to intimidate a witness to come and testify when they have no basis.

What 704 was aimed at was allowing the law enforcement agency here, the EEOC, to have access to complaints about discrimination and witnesses, allowing the courts to have access to complaints and witnesses

because without that free access and without 704 acting as a guardian around the primary rights, the primary rights would be eviscerated.

This is a perfect example of -- of a case where that's the situation. You have a -- a woman here who did exactly what this Court asked her to do in Ellerth. She complained internally about sexual harassment. She was hired because of her forklift responsibilities. She was immediately put on the forklift. She performed for 90 days competently as a forklift operator. No complaints about what she did. Because she complained about sexual harassment, the jury found, and correctly, she was removed from the forklift.

JUSTICE SCALIA: I'm -- I'm a supervisor, and the employee files a complaint against me as a supervisor. Thereafter, I am not as friendly to that employee as I used to be. I don't smile and say, good morning, how are you, as I used to. All right?

(Laughter.)

JUSTICE SCALIA: And you wouldn't expect me to. This person has, you know, hauled me onto the block. Now, am -- am I discriminating against that person?

MR. DONATI: No, Justice Scalia.

JUSTICE SCALIA: I'm not? I'm not treating her the way I did before.

MR. DONATI: No. Until there is some use of official authority that affects that individual, you're not discriminating. That's a -- that's a personal matter between you and the individual.

JUSTICE SCALIA: Sort of like taking her to lunch.

MR. DONATI: If it's -- if it's a blue collar worker and it's -- it's not part of their responsibility and they sometimes eat together in the lunchroom or not, that would not be. However, if it is a --

JUSTICE SCALIA: Now, you say it -- it has to be part of my -- it doesn't have to relate to her terms and conditions of employment, you say --

MR. DONATI: No --

JUSTICE SCALIA: -- because it's not the same as 703. But somehow you say it -- it has to. Does it have to or not have to?

MR. DONATI: There are situations where it would be broader than 703. 704 would be broader. An example. If a CEO of a company came up to an African American male and punched him because he's black, that would not rise to the level of a hostile work

environment under your test. It wouldn't alter that individual's terms and conditions of employment.

However, if the CEO came up to an individual who had filed a charge of discrimination -- of discrimination, and said, I don't like you filing charges of discrimination, and pushed that individual, that would have the effect of impeding individuals from complaining. And that's -- that's a situation that's different because Congress anticipated that -- that retaliation is only as varied as the human imagination. Congress could have easily --

JUSTICE SCALIA: Yes, I worry about that, as -- as varied as the human imagination. Juries can have wonderful imaginations. I mean, that -- that is the problem. Is it meant to be this -- this uncontrolled, this uncabined?

MR. DONATI: Your Honor --

JUSTICE SCALIA: What -- what is your criterion that is going to stop every little thing from -- from being deemed a retaliatory measure, such as not saying good morning to this employee?

MR. DONATI: There are several things that are built into the statute. First is 701(b). It has to be an act of the employer, and those trivial matters --

JUSTICE SCALIA: Yes, I understand that. But almost any act of his subordinates will be deemed act of the -- of the employer where retaliation is concerned, I'll bet you.

What else besides that?

MR. DONATI: Plus, you always have to show causation, and many, many cases are dismissed on the basis of summary judgment, even termination cases on the basis of causation.

JUSTICE SCALIA: I'll give you causation.

But I'm talking about the triviality -- the triviality of the action in question. Is there no test that eliminates a trivial action from the aggrieved employee who -- who wants to litigate?

MR. DONATI: Your Honor, both the EEOC test, as well as our test, is one based upon a reasonable person under all of the circumstances. And -- and the trial courts frequently say under this set of --

JUSTICE SCALIA: A reasonable person would what -- would what?

MR. DONATI: Under our standard, it would be --

JUSTICE SCALIA: A reasonable person would consider it to be?

MR. DONATI: Adverse.

JUSTICE SCALIA: Adverse.

MR. DONATI: If it was -- if it was unfavorable to the plaintiff. On the EEOC standard, it would be if it deterred an individual from filing a charge.

And, Justice Scalia, we have cited favorably the EEOC standard. What we were asked to do here --

JUSTICE SCALIA: Why is the EEOC standard any more based in the text of the statute than -- than the standard proposed by your adversary here?

MR. DONATI: That's why we proposed one that's based with what the statute means. And -- and the statute is very clear. The plain language is unambiguous. That's our first test, which is unfavorable to the employee based upon an objective standard.

But if the Court felt it necessary to -- to back to a position that was not quite so expansive, the EEOC standard is -- is the one that's most rational because it's based in the purpose of 704(a).

JUSTICE GINSBURG: You won on the basis of the standard that the Sixth Circuit used, which was not your standard and not the EEOC standard. Why should this Court deal with anything other than that the petitioner's standard is unsatisfactory, that at least

the Sixth Circuit standard -- why should the Court deal with the universe of cases when it has this case before it, two actions, and a unanimous Sixth Circuit judgment that says these two actions fall within 704?

MR. DONATI: Justice Ginsburg, you're exactly correct. You don't have to reach the issue about how expansive 704 is here. You can affirm the Sixth Circuit's decision based upon the material adverse employment action standard that they articulated, that was litigated below, that the defendant did not object to, and which we won on.

CHIEF JUSTICE ROBERTS: Counsel, you said earlier that the act -- one of the protections against trivial charges was that the act had to be the act of the employer. If the employer sets up a review system in which the final act of the employer is the decision, why is a preliminary charge, initial suspension, review -- why are those also considered acts of the employer?

MR. DONATI: Mr. Chief Justice, I want to answer one question related to that. The collective bargaining agreement did not cover the forklift. That's in the trial transcript on page 524. It was a new position It was not covered by the collective bargaining. So they --

CHIEF JUSTICE ROBERTS: What does that mean,

it was not covered by the collective bargaining agreement? Presumably you paid -- the person who did that was paid wages pursuant to the collective bargaining agreement.

MR. DONATI: It was not a defined job within the collective bargaining agreement. And if you look at the -- the job title, which is part of the joint appendix, forklift is not mentioned, and it was not part of that.

But to answer your question specifically with respect to these facts, the -- in this case here, she was discharged. If you look at the joint appendix, rule 91(b) -- and that's found at page 54 and 55 of -- I'm sorry. 55 of the joint appendix. This is the rule under which she requested the, quote, investigation. By its very terms, it doesn't even apply until an employee is, quote, disciplined or, quote, dismissed. She was dismissed when she was removed from service. Then she asked for a hearing under subpart (b), and she was given an investigation.

This Court, in its jurisprudence dealing with statute of limitations, said in the Morgan case that an act of discrimination occurs when it happens. Well, when she was happened -- when this happened, she lost pay, she lost benefits. She was terminated. Even --

even their own witness, Roadmaster Brown, testified had she not asked for an appeal, she was terminated. So it was a discrete act at that time.

CHIEF JUSTICE ROBERTS: Your position is that it would be an -- it would be a covered employment action even if none of that were true, she didn't lose pay, she didn't lose benefits, so long as there was the initiation of the disciplinary action. You regard that as sufficiently adverse under 704.

MR. DONATI: Well, under these facts, it was sufficiently adverse because she lost pay. Now, in a -- in a theoretical sense, if she had not lost pay, that still could be adverse under 704(a). It depends upon the effect and the motive. I don't think that anyone would quarrel under 703 if an African American was suspended without pay because of race, that that would be actionable. Why would it not be actionable in this context?

There's a difference between damages and whether or not there's actionability under this one little part of -- of the claim. Perhaps if she was -- was suspended for a retaliatory motive and 5 days later she was returned, she may have no damages, and -- and the claim might -- but in terms of --

CHIEF JUSTICE ROBERTS: Other than

eligibility for punitive damages.

MR. DONATI: Well, assuming that you could get through the hurdles. And I don't think punitive damages would necessarily sound there. In the Kolstad case, the Court indicated one factor to consider would be how quickly the -- the defendant corrected the situation. I mean, if you have a -- if there's a legitimate process that's -- that's available and a supervisor who has authority to suspend does that for a retaliatory motive and -- and that process corrects it, it may be a factor in punitives, but it's not a factor whether a -- an act has been taken because the act is a discrete act. It caused her to lose compensation and -- and to lose benefits. So it could affect the punitive damages.

Now, with respect to the -- the statutory construction -- well, let me address the -- the forklift issue just a -- a little bit further.

If you take the position that the -- the petitioner has here, Ms. White -- it's a jury finding. Their witnesses testified -- went from the most easy or one of the most easy positions to the most difficult position because she complained about sexual harassment. That's the finding of fact. They don't dispute the findings of fact. That's the finding of

fact. So if -- if he's correct, tomorrow, if his -- his position is affirmed, they could tell everyone who complains about sexual harassment, that if you do that, we're going to transfer you to the most difficult position in the company.

JUSTICE SCALIA: Suppose -- suppose I disagree with you as to the standard, that is, I think 704 and 703 both require something related to the employment. Would -- what would the outcome be? Would -- would the case have to go back to be submitted to the jury under that standard? What standard did the jury find --

MR. DONATI: Your Honor, if -- if you look at -- if you look at the joint appendix at page 63, the trial judge actually instructed the court -- instructed the jury, listing six factors. Those six factors are listed in a footnote in Ellerth, which you cite favorably as what the standard is -- or what the standard is for vicarious liability. So the court -- the jury was instructed on material adverse employment action standard. It was tried on the material adverse employment action standard.

I argued that the forklift position was materially adverse. The defendant, if you look at the transcript of the closing at pages 48 and 49, didn't

even challenge that it was adverse. Everybody that heard the proof, common sense told you that when you went from a forklift running things around to pulling out railroad ties, it was adverse. So to answer your question, Justice Scalia, we traveled all the way up to this Court on the material adverse employment action standard, and we won.

JUSTICE ALITO: What does -- what does material mean?

MR. DONATI: That's a great question, and we --

(Laughter.)

MR. DONATI: -- and we -- we truly struggled with that. We found nothing in the statute, the text of the statute to say material. Where it uses adverse, at -- at section 703(a)(2), it uses the term adverse, but it doesn't use it with the term material. And --

JUSTICE SOUTER: Well, do -- do you think it does anything more than just eliminate clearly de minimis action?

MR. DONATI: I'm sorry. I didn't --

JUSTICE SOUTER: Do -- do you think the -- the materially modifier here does anything other than eliminate obviously de minimis behavior on the part of the employer?

MR. DONATI: I don't think it does anything other than that.

It could also be interpreted as -- as this Court said in the -- in the Wrigley case involving interpretation of statutes, that there's a de minimis rule. It could -- it could also be applied that way, that every -- every statute -- there's a -- that -- that construction applies some de minimis level view.

But in terms of this case, this was definitely material. I mean, it was substantial injury, substantial action to -- to Ms. White.

But with respect to the forklift, their witnesses testified -- and we cite at pages 2 and 3 of the brief -- that they considered it easier. The supervisor, Mr. Brown, testified that the men considered it easier. And it clearly was.

CHIEF JUSTICE ROBERTS: What -- what if she operated the forklift usually 3 out of 5 days, and the other 2 days was pulling up the rail ties and -- and the shift was now she does -- operates the forklift 2 out of 5 days and 3 out of 5 days she's pulling up rail ties? Is that materially adverse?

MR. DONATI: That probably would not -- I probably could not convince a jury that that was materially adverse. But --

JUSTICE SCALIA: Well, that isn't the test, I mean, whether you can convince a jury.

I think you -- you have to acknowledge that -- that before we -- we say that these trial instructions were adequate to -- to give you your victory, we -- we have to find that at least a reasonable jury could conclude under section 703 that -- that both of these -- both of these adverse actions qualified as discrimination under 703, if -- if we're going to use that test. Right? You acknowledge that.

MR. DONATI: I acknowledge and the facts -- and the Sixth Circuit unanimously affirmed that -- that the facts were there. And I could -- I could go on for 30 minutes about the facts, and they're -- they're contained in the first --

JUSTICE SCALIA: Okay, but that -- that is at least what -- what's before us here, that if -- if we go the 703 equals 704 route, we would have to conclude, in order to affirm here, that a reasonable jury could find. This jury did, but we'd have to find that that's reasonable. Right?

MR. DONATI: Yes.

You know, I would like to address two things that have been mixed. Apples and oranges have been mixed here about tangible employment action, and that's

the standard this Court has adopted.

What the Court did in Ellerth was apply the rules of vicarious liability in a discrete set of -- of cases, harassment cases. Harassment cases arise out of the word condition. As you indicated, sexual harassment has to alter the condition, and it has to be severe or pervasive. And what the -- the petitioner is -- is saying is that because of your application of tangible employment action to vicarious liability, that you really defined what constitutes discrimination.

Well, that's not what the -- the ruling was. You were strictly limited to whether instances of vicarious liability, when -- when employers will be found liable. At the outset, that needs to be, I think, clarified that it was not a finding of what constitutes discrimination.

And with respect to also the Ellerth situation, any test that this Court adopts should not be a per se test where some things are per se legal, because when you say that an act of retaliation is per se legal, it provides safe harbor for people to do things to individuals. Most employers are --

JUSTICE BREYER: Am I right in thinking -- I just want to clarify this -- that in the circuit court, they applied a pretty tough standard, namely, a

standard that sounds a lot like Ellerth, the Kocsis, or whatever it is? Tangible employment actions, a significant change in employment status, hiring, firing, failing to promote, reassignment with significantly different responsibilities, or a decision causing a significant change in benefits. And that's basically what the jury was instructed.

MR. DONATI: That's --

JUSTICE BREYER: And you won under the toughest standard.

MR. DONATI: That's correct, a very tough standard.

JUSTICE BREYER: So in a sense, you have nowhere to go but up.

(Laughter.)

MR. DONATI: Exactly right. And I find -- and I find myself, Justice Breyer, here sort of arguing against the standard that I won under.

JUSTICE BREYER: You don't care what standard --

MR. DONATI: And I don't care what standard it is.

JUSTICE BREYER: -- for this case.

MR. DONATI: I don't care what the standard is for this case.

But if you adopt a -- a standard that is -- is broad -- or you have to adopt a national standard or -- and you don't have to here. You don't have to make these -- make these findings.

But if you do and you adopt a material adverse employment action standard, there always needs to be a provision that prevents per se rules because -- and in the Sixth Circuit, they talk about unique circumstances. Some other circuits talk about unusual or exceptional circumstances because if you -- if you black letter something, that this is legal retaliation, employers who want to will engage in that process.

JUSTICE SCALIA: Yes, and the other argument is that if you don't do it, there's no way to -- to get a case dismissed before it goes to a jury. You're saying every claim is going to be a jury trial. I mean, that -- you know, come on.

MR. DONATI: Justice Scalia, every claim would not be a jury trial because you're going to have to show the causation issues and damages issues. And --

JUSTICE SCALIA: But the triviality issue would be out of the case. No matter how trivial, it goes to a jury. That's -- that's what you want us to say.

MR. DONATI: No, Your Honor, that's not what I want --

JUSTICE SCALIA: Well, then we have to have some per se rules.

MR. DONATI: Well, the -- the rule that you could apply that would not have per se rules and would ferret out any kind of -- of trivial matters would be the EEOC standard with a de minimis rule.

JUSTICE GINSBURG: Don't you want us to exclude this ultimate employment decision? I think that's one thing. In order to win, you have to say what counts is the suspension and not the ultimate decision.

MR. DONATI: Yes, Your Honor. Under the ultimate employment action standard of the Fifth Circuit, the -- the suspension would be in question.

JUSTICE GINSBURG: So for you to win to preserve your Sixth Circuit victory, that would have to be ruled out.

MR. DONATI: The Court should find that that's not applicable and it's not appropriate under title VII and -- and that would be necessary for us to prevail, even though the defendant did not argue ultimate employment action standard at the trial level, didn't ask for such an instruction, didn't raise that

issue until subsequent to the -- this. But you're correct. We would need the Court to say that that does not apply.

And then one other issue about -- about bright line rules. I advise and many lawyers advise women every day that complain about sexual harassment. And Mr. Phillips is absolutely correct. There has been a rise in retaliation claims. And, of course, it's complex what the reasons are, but anecdotally I can tell you a lot of it sits at the foot of Ellerth because employers establish policies, they publish their policies, they educated women and men about those policies. People use those policies, and women who complain about sexual harassment, such as Ms. White, internally and then are retaliated against, when they go to the EEOC, they file a retaliation claim. And there's been an increase of those claims.

But if this Court applies a black line rule, a per se rule, where you say something is legal, that you can do what you did to Ms. White, then I'll have to advise individuals to go to the EEOC. There might be some retaliation and it's legal. And a woman placed in a situation like that will not complain about sexual harassment. And the protection, the guardian that rule -- that 704(a) has around the primary right will be

eliminated, and the primary right will be adversely affected because women will no longer complain. So whatever rule you apply, don't apply a black letter, per se rule because you're going to cause serious harm to the underlying primary rights.

If there are no more questions.

CHIEF JUSTICE ROBERTS: Thank you, counsel.

MR. DONATI: Thank you.

CHIEF JUSTICE ROBERTS: Mr. Phillips, you have 2 minutes remaining.

REBUTTAL ARGUMENT OF CARTER G. PHILLIPS

ON BEHALF OF THE PETITIONER

MR. PHILLIPS: Thank you, Mr. Chief Justice.

Let me begin by focusing on the jury instruction in this case. The jury was not instructed with the Ellerth standard. There's a variant of the Ellerth standard, and it was not upheld by the court of appeals on the Ellerth standard.

What the court of appeals said was in the Sixth Circuit there is a unique circumstances standard that arises out of its particular way of analyzing these issues, and under that standard, it could be upheld. And that was the same basis on which the district court at Pet. App. 118a upheld this particular verdict.

So the question of the right standard to be applied and whether a reasonable jury could find it under these circumstances, Justice Scalia, is clearly presented in this case, and it's an issue that this Court still has to decide.

Second, with respect to the suspension, the -- the collective bargaining agreement specifically provides for discipline and then 15 days. It's not a final decision. There's nothing in that collective bargaining agreement that says it's a decision of the employer. To the contrary, the decision at the end of the -- of the investigation is the decision of the carrier. And we don't need a final employer action standard in order to prevail on this. What we need is the opportunity to cure and a reasonable way under -- under section 704, as the D.C. Circuit held specifically in Taylor.

And then finally, with respect to the observation about, you know, don't make any per se rules, well, the truth is there aren't going to be any per se rules. There will be a lot of cases that get dismissed out under a tangible employment action theory because there aren't tangible employment actions. But there will always be available the severe and -- and pervasive standard, which is always going to constrain

any employer from -- from adopting those kinds of policies.

And the point that counsel made is that he recommends to every one of his employees -- he probably should recommend two things. One, you show up. You ought to file a complaint about discrimination in the work place because under his approach, you will, therefore, be super-protected under section 704 in a way you wouldn't have been by merely being protected under 703. That cannot possibly be what Congress intended or what is helpful for the work place. The Court should reject that approach, should reject the Sixth Circuit's view, and remand.

Thank you, Your Honors.

CHIEF JUSTICE ROBERTS: Thank you, Mr. Phillips.

The case is submitted.

(Whereupon, at 12:04 p.m., the case in the above-entitled matter was submitted.)